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No. 85-1661

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

**KEVIN P. COONEY,**

*Petitioner,*

v.

**PEOPLE OF THE STATE OF ILLINOIS,**

*Respondent.*

**On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

I.

Whether Illinois' "reasonable, innocent person" test for determining whether one is in custody accords with Fourth Amendment principles.

II.

Whether the Illinois Appellate Court properly relied upon *Miranda v. Arizona* in adjudging the constitutionality of Petitioner's confession.

III.

Whether Petitioner's confession was properly admitted into evidence.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW .. | i |
| TABLE OF CONTENTS ..... | ii |
| TABLE OF AUTHORITIES ..... | iii |
| PRAYER ..... | 1 |
| OPINION BELOW ..... | 2 |
| JURISDICTION ..... | 2 |
| CONSTITUTIONAL PROVISIONS INVOLVED ..... | 2 |
| STATEMENT OF FACTS ..... | 3 |
| REASONS FOR DENYING THE WRIT: | |
| I. | |
| ILLINOIS' "REASONABLE, INNOCENT PERSON" TEST FOR DETERMINING WHETHER ONE IS IN CUSTODY ACCORDS WITH FOURTH AMENDMENT PRINCIPLES ..... | 5 |
| II. | |
| THE ILLINOIS APPELLATE COURT PROPERLY RELIED UPON *MIRANDA v. ARIZONA* IN ADJUDGING THE CONSTITUTIONALITY OF PETITIONER'S CONFESSION ..... | 7 |
| III. | |
| PETITIONER'S CONFESSION WAS PROPERLY ADMITTED INTO EVIDENCE ..... | 8 |
| CONCLUSION ..... | 9 |

# TABLE OF AUTHORITIES


| CASES | PAGE |
|---|---|
| *Dunaway v. New York*, 442 U.S. 200 (1979) ... | 7, 8 |
| *Hicks v. United States*, 382 F.2d 158 (D.C. Cir. 1967) ..... | 6 |
| *I.N.S. v. Delgado*, 104 S.Ct. 1758 (1984) ..... | 5 |
| *Miranda v. Arizona*, 384 U.S. 436 (1966) ..... | 7, 8 |
| *United States v. Mendenhall*, 446 U.S. 544 (1980) . | 5, 6 |
| *United States v. Pajari*, 715 F.2d 1378 (8th Cir. 1983) ..... | 6 |
| *United States v. Willis*, 759 F.2d 1486 (11th Cir.), *cert. denied*, 106 S.Ct. 144 (1985) ..... | 6 |
| *United States v. Wylie*, 569 F.2d 62 (D.C. Cir. 1977) ..... | 6 |

CONSTITUTIONAL PROVISIONS

| | |
|---|---|
| Fourth Amendment, United States Constitution . | 2, 5, 7, 8 |
| Fifth Amendment, United States Constitution .... | 2, 8 |

TREATISE

| | |
|---|---|
| 1 LaFave and Israel, *Criminal Procedure* §3.8(c) (1984) ..... | 6 |

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## RESPONDENT'S BRIEF IN OPPOSITION

### PRAYER

The Respondent asks this Court to deny the petition for writ of certiorari to review the judgment and order of the Appellate Court of Illinois for the Second Judicial District insofar as the Petitioner's issues do not raise questions of constitutional proportion worthy of review by this Court.

## OPINION BELOW

The Petitioner seeks review from an Illinois Appellate Court, Second District, opinion in *People of the State of Illinois v. Kevin P. Cooney, Donald P. Loder*, Nos. 83-817, 83-886 (2d Dist. 1985). A copy of the opinion is included with Petitioner's petition. The Petitioner's petition for leave to appeal to the Illinois Supreme Court was denied on February 27, 1986.

## JURISDICTION

The jurisdictional requirements are adequately set forth in the petition. As treated more fully in the argument contained herein, however, Petitioner has not shown grounds for this Court to exercise its sound discretion to grant his Petition for Writ of Certiorari.

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST., AMENDMENT IV:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons or things to be seized.

U.S. CONST., AMENDMENT V:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

## STATEMENT OF FACTS

On the night of May 15, 1981, the body of Zigfield Troy was found at the Troy Golf Course. Mr. Troy had been stabbed 36 times and had also been robbed. Zigfield Troy's wife told police that when she came across her husband's body on the golf course, she saw a young male who looked like Kevin Cooney leaving the scene.

At 3:50 a.m. the next morning, two police officers were dispatched to the Cooney residence. The officers told Helen Cooney, Petitioner's mother, that they were investigating an incident that took place that night at the Troy Golf Course. The police officers did not state that they were investigating a murder.

At the officers' request, Mrs. Cooney asked Petitioner and Donald Loder to come up from the basement. The police told the boys they were investigating an incident. After the boys gave exculpatory statements explaining their whereabouts the night of Zigfield Troy's murder, the police asked to see the clothes they wore that night. With the boys' permission, several of the items were taken to the police station. The police officers then asked the boys whether they would be willing to go to the police station. Mrs. Cooney agreed the boys could go.

Petitioner and Loder were driven to the police station unhandcuffed in the back seat of an unmarked squad car. During the drive, one of the boys commented that he did not think they could be of much help to the police. The officer driving the car either slowed or stopped the car and offered to return the boys home. One of the boys told the police they did not mind going to the police station and that they would do what they could to help. The police officers contended at trial that they would have taken the boys home if they had been asked.

At the police station, the boys were put in separate rooms and were asked to write statements describing their whereabouts on the evening of May 15. Petitioner was then advised of his *Miranda* rights and he waived those rights. Loder was also advised of his *Miranda* rights and he too waived those rights.

Petitioner then asked to speak with Kevin Loder. Petitioner asked Loder, "Do we tell them what happened on the Zigfield Troy property?" Loder assented and Petitioner confessed that he and Loder had committed the the armed robbery and murder of Zigfield Troy.

At trial, Petitioner moved to suppress the evidence seized at his residence and the statements which he had made to the police. Petitioner contended that evidence was obtained in violation of his Fourth and Fifth Amendment rights.

The trial court denied the motion, ruling that Petitioner and Loder had voluntarily accompanied the police to the police station and that the police treated the boys as potential witnesses until the point at which they inculpated themselves. The trial court also ruled that especially in light of the officers' offer to take Petitioner and Loder home, a reasonable, innocent person would have believed himself free to leave.

Following a jury trial, Petitioner was convicted for the murder and armed robbery of Zigfield Troy. Petitioner was sentenced to serve a term of 40 years for murder and 30 years for armed robbery.

The Illinois Appellate Court affirmed Petitioner's conviction on September 23, 1985. Petitioner's petition for leave to appeal to the Illinois Supreme Court was denied on February 5, 1986.

## REASONS FOR DENYING THE WRIT

### I.

### ILLINOIS' "REASONABLE, INNOCENT PERSON" TEST FOR DETERMINING WHETHER ONE IS IN CUSTODY ACCORDS WITH FOURTH AMENDMENT PRINCIPLES.

No warrantable concerns compel this Court to exercise its discretionary jurisdiction to review the decision below. The test Illinois courts generally rely upon to determine whether a person is in custody plainly meets this Court's constitutional standards. Moreover, Petitioner's challenge based on that test does not present the kind of novel or pressing issue meriting review by this Court.

Petitioner asserts that the Illinois Appellate Court relied upon an incorrect test for determining whether he was taken into custody by the police. The Appellate Court in the case at bar stated that the test for determining whether a statement has been made in a custodial setting is "whether a reasonable, innocent person would have believed that he was free to leave." *People v. Cooney*, Nos. 83-817, 83-886, slip op. (2d Dist. Sept. 23, 1985). This Court has held, however, that the appropriate test is whether in view of all of the attendant circumstances, "a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). *See also I.N.S. v. Delgado*, 104 S.Ct. 1758, 1762 (1984) (affirming test). Thus Petitioner's claim centers on the inclusion of the word "innocent" in the Illinois test.

Respondent submits that the Illinois test is absolutely in accord with the test this Court has set. If analysis of the "reasonable person" test permitted consideration of whether a guilty man would have believed he was free

to leave police officers' presence, then the "reasonable person" standard could be tested by one who would obviously have a greater incentive to leave. Certainly, a guilty person is much less likely to believe he is free to leave a police officer's presence than is an innocent person. Respondent accordingly submits that this Court's "reasonable person" test contemplates consideration of what an arrestee with his subjective fears would think only to the extent that the arrestee's apprehensions coincide with what a reasonable, innocent person would believe under like circumstances. *See Hicks v. United States*, 382 F.2d 158, 161 (D.C. Cir. 1967).

This interpretation of the "reasonable person" test accords with this Court's direction that analysis of seizures be based on evaluation of objective factors. *Mendenhall*, 446 U.S. 544, 555 (1980). Moreover, this interpretation is consistent with the standards that many of the lower courts have applied to "seizures":

> There is no Fourth Amendment seizure when the policeman, although perhaps making inquiries which a private citizen would not be expected to make, has otherwise conducted himself in a manner consistent with what would be viewed as a nonoffensive contact if it occurred between two ordinary citizens.

1 LaFave and Israel, *Criminal Procedure* §3.8(c) (1984). *See also United States v. Willis*, 759 F.2d 1486, 1496 (11th Cir.), *cert. denied*, 106 S.Ct. 144 (1985) (reasonable, innocent person standard); *United States v. Pajari*, 715 F.2d 1378, 1381 (8th Cir. 1983) (same); *United States v. Wylie*, 569 F.2d 62, 68 (D.C. Cir. 1977) (same).

Therefore, because the "reasonable, innocent person" test which the Illinois Appellate Court applied in the instant case is wholly consistent with this Court's standard for adjudging "seizures," Petitioner's contention does not warrant review by this Court.

## II.

## THE ILLINOIS APPELLATE COURT PROPERLY RELIED UPON *MIRANDA v. ARIZONA* IN ADJUDGING THE CONSTITUTIONALITY OF PETITIONER'S CONFESSION.

Petitioner's claim that the Illinois Appellate Court disregarded the holding in *Miranda v. Arizona*, 384 U.S. 436 (1966) does not merit review by this Court.

Initially, Petitioner's contention that the Illinois Appellate Court ignored the rule set forth in *Miranda* is incorrect. The Appellate Court specifically noted that Petitioner raised a *Miranda* issue, discussed the relevant facts, and then ruled that Petitioner's *Miranda* claim must fail. *People v. Cooney*, Nos. 83-817, 83-886, slip op. (2d Dist. Sept. 23, 1985).

Petitioner asserts in connection with this claim that the Appellate Court should have undertaken separate analyses of the *Miranda* issue he raised and the Fourth Amendment issue he raised under *Dunaway v. New York*, 442 U.S. 200 (1979). As the Appellate Court correctly noted, however, a necessary predicate to Petitioner's prevailing on either the *Miranda* or the *Dunaway* issue is that he must have been in custody at the time he was interrogated. *See Miranda*, 384 U.S. at 444; *Dunaway*, 442 U.S. at 216. As the Appellate Court concluded, Petitioner failed to prove this threshold custody issue.

Petitioner claims that the Appellate Court's analysis was "simplistic," yet he wholly fails to specify in what respect the Appellate Court ignored either the *Miranda* or the *Dunaway* issue. In point of fact, since the *Dunaway* decision helps define "seizures," the discussion of *Dunaway* in conjunction with the *Miranda* question was perfectly appropriate.

Therefore, since Petitioner has failed to demonstrate how the Fourth and Fifth Amendment issues were improperly interrelated, his assertion that this Court should grant his petition to clarify the interrelationship between these Amendments should be rejected.

## III.

## PETITIONER'S CONFESSION WAS PROPERLY ADMITTED INTO EVIDENCE.

Petitioner's claim that his confession should have been suppressed pursuant to the precepts set forth in *Miranda* and *Dunaway* should also be rejected by this Court.

First, Petitioner's implicit assertion that the Appellate Court improperly applied the law to the facts does not in and of itself present a novel or pressing constitutional issue worthy of review by this Court.

Second, the Appellate Court's ruling on Petitioner's motion to suppress was appropriate. The evidence showed that the police officers' visit to Petitioner's home was investigatory in nature and that Petitioner's cooperation was purely voluntary. Petitioner's mother agreed to the officers' request that her son accompany them to the police station. Moreover, on the way to the police station, the officers offered to drive Petitioner home when either he or his co-defendant expressed doubt regarding their ability to help the officers.

Petitioner's confession was therefore not obtained in violation of his Fourth or Fifth Amendment rights. Petitioner's claim to the contrary does not merit review by this Court, since the issue was correctly decided by the Illinois Appellate Court pursuant to prevailing Supreme Court precedent.

## CONCLUSION

For the foregoing reasons, the Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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